SAAD MARWI

v.

CHAN HWAN HUA & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: P-02-55-1996]
24 MARCH 2001

CONTRACT: *Sale and purchase of land - Inequality of bargaining power - Whether recognised in Malaysian courts - Approach to be taken - Factors raising inference of inequality - Civil Law Act 1956, s. 3(1)(a)*

CONTRACT: *Specific performance - Sale and purchase of land - Inequality of bargaining power - Whether recognised in Malaysian courts*

CIVIL PROCEDURE: *Appeal - Grounds of judgment - Delay in issuance - Whether factor to be considered in evaluating judge's decision*

CIVIL PROCEDURE: *Damages - Agreement for sale of land - Delay in bringing action - Whether ground for dismissal of action - Whether equitable defence of laches can be used to defeat common law remedy of damages - Limitation Act 1953, s. 32*

The appellant, a farmer, rented some land from the respondents ('the leased land'), from which he harvested coconuts. The appellant also held two pieces of land ('the property') by prescriptive right under the land law in force in Penang at the material time, which meant that his title was defeasible and this defeasibility was confirmed by an indorsement on the title.

On 11 November 1975, he entered into an agreement with the respondents to sell them the property for RM42,000. The written agreement, which was in the English language, merely stated that a deposit of RM4,200 was paid but did not specify that it was by way of offset of the rent payable to the respondents for the leased land. It also required the appellant to make good title within 12 months of the agreement and obtain a court order establishing his ownership. The appellant obtained a cancellation of the indorsement on 22 January 1981 but failed to obtain the court order. Meanwhile on 24 October 1979, the appellant had purported to terminate the agreement. The respondents refused to accept the termination but did not bring proceedings until 25 May 1981.

In the High Court, the appellant defended the claim on the grounds of undue influence and laches. The trial judge rejected the defence of undue influence but declined specific performance on the ground that the parties were equally to blame and awarded the respondents RM1.2m representing half the market value of the property.

The appellant appealed and the respondents cross-appealed but subsequently dropped their cross-appeal. The issue before the court was whether the doctrine of inequality of bargaining power falling short of undue influence was recognised in Malaysian jurisprudence, in light of s. 21(2)(a) of the Specific Relief Act 1950 ('the SRA'), s.16 of the Contracts Act 1950 and s. 111 of the Evidence Act 1950.

Held:
Per Gopal Sri Ram JCA

[1] An examination of English case law and that of commonwealth jurisdictions makes it plain that English equity jurisprudence does in fact recognise a wider doctrine of unconscionable bargains as a species of equitable fraud. The time has come for Malaysian courts to recognise the wider doctrine of inequality of bargaining power by adopting the English doctrine, which we are at liberty to do by virtue of s. 3(1)(a) of the Civil Law Act 1956.

[2] What is called for is a fairly flexible approach which adopts the English doctrine but which applies it in a broad and liberal way as in Canada, where the courts have strived to protect those incapable of protecting themselves, not against their own folly, but against those who would take advantage of them by being in a superior bargaining position.

[3] As the trial judge did not deny the respondents' specific relief on the ground on unconscionability, that question was still open for resolution. The facts such as the appellant's dependence on the respondents for his livelihood, the agreement's failure to disclose that the deposit was payable by way of set-off, the appellant's non-receipt of legal advice and the fact that he spoke no English, raised the inference that the respondents were in a position of advantage. The trial judge's misdirection when he concluded the appellant was not a naive and inexperienced businessman warranted appellate interference.

[4] Furthermore, the trial judge's grounds of judgment were not available until March 2000, which delay lessened the weight of any views expressed by the judge on the credibility of witnesses due to the passage of time and failing memory. A tribunal properly directing itself on the law and evidence would have concluded the agreement was an unconscionable bargain and the appellant was entitled to have the suit dismissed with costs.

[5] Lastly, the respondents' delay or laches of at least 19 months in bringing their claim was also sufficient ground to dismiss it. Section 32 of the Limitation Act 1953 speaks of the court's right to refuse relief on the ground of laches, and it must therefore follow that this section permits the equitable defence of laches to defeat the common law remedy of damages.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu, seorang peladang, menyewa tanah daripada responden-responden ('tanah yang dipajakkan'), di mana beliau menghasilkan kelapa daripada tanah tersebut. Perayu juga memegang dua bidang tanah ('hartanah tersebut') melalui hak preskriptif di bawah undang-undang tanah yang berkuatkuasa di Pulau Pinang pada waktu berkenaan itu, yang mana bermaksud bahawa hakmilik beliau adalah boleh disangkal dan ini disahkan oleh suatu pengendorsan pada hakmilik tersebut.

Pada 11 November 1975, beliau telah memasuki satu perjanjian dengan responden-responden untuk menjual kepada mereka hartanah tersebut bagi harga sebanyak RM42,000. Perjanjian bertulis tersebut, yang berbahasa Inggeris, hanya menyatakan bahawa deposit sebanyak RM4,200 telah dibayar tetapi tidak menentukan bahawa ianya adalah dengan ofset sewaan yang kena dibayar kepada responden-responden untuk tanah yang dipajakkan itu. Ianya juga menghendaki perayu untuk membuat hakmlik yang sempurna dalam tempoh 12 bulan daripada perjanjian tersebut dan mendapatkan perintah mahkamah yang menetapkan hak keempunyaan beliau. Perayu telah memperolehi pembatalan pengendorsan pada 23 Januari 1981 tetapi gagal mendapatkan perintah mahkamah. Sementara itu, pada 24 Oktober 1979, perayu telah berniat untuk menamatkan perjanjian tersebut. Responden-responden gagal untuk menerima penamatan tersebut tetapi tidak memulakan prosiding sehingga 25 Mei 1981.

Dalam Mahkamah Tinggi, perayu membela rayuan tersebut atas alasan pengaruh tak berpatutan dan kelewatan. Hakim perbicaraan menolak pembelaan pengaruh tak berpatutan tetapi menafikan perlaksanaan spesifik atas alasan bahawa pihak-pihak tersebut bersama-sama disalahkan dan mengawardkan responden-responden RM1.2 juta yang merupakan setengah harga pasaran bagi hartanah tersebut.

Perayu telah merayu dan responden-responden merayu balas tetapi kemudiannya membatalkan rayuan balas mereka. Isu di hadapan mahkamah adalah samada doktrin ketidak-samaan kuasa tawar-menawar yang tidak sampai kepada pengaruh yang tak berpatutan diiktirafkan dalam jurisprudens Malaysia, memandangkan s. 21(2)(a) Akta Relief Spesifik 1950 ('SRA tersebut'), s. 16 Akta Kontrak 1950 dan s. 111 Akta Keterangan 1950.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Suatu pemeriksaan undang-undang kes Inggeris dan bidangkuasa komenwel jelas menunjukkan bahawa jurisprudens ekuiti Inggeris memang pada hakikatnya mengiktirafkan doktrin tawar-menawar tidak patut yang lebih luas sebagai satu spesi ekuiti fraud. Masanya telah tiba untuk mahkamah-mahkamah Malaysia mengiktirafkan doktrin ketidak-samaan kuasa tawar-menawar dengan menerima-pakai doktrin Inggeris, yang mana kami bebas untuk melakukannya menurut s. 3(1)(a) Akta Undang-Undang Sivil 1956.

[2] Apa yang diminta adalah suatu pendekatan fleksibel yang agak sederhana yang menerima-pakai doktrin Inggeris tetapi dengan cara yang luas serta liberal seperti di Kanada, di mana mahkamah-mahkamah telah berusaha untuk melindungi mereka yang tidak berkeupayaan untuk melindungi diri sendiri, bukan kerana kejahilan mereka sendiri tetapi kerana pihak yang akan mempergunakan mereka berada dalam kedudukan tawar-menawar yang lebih tinggi.

[3] Oleh kerana hakim perbicaraan tidak menafikan relief spesifik responden-responden atas alasan ketidakpatutan, persoalan itu masih terbuka untuk penyelesaian. Fakta-fakta seperti harapan atau penggantungan perayu ke atas responden-responden untuk kehidupannya, kegagalan perjanjian tersebut untuk mendedahkan bahawa deposit tersebut boleh diofset, perayu tidak menerima nasihat undang-undang dan hakikat bahawa beliau tidak mengetahui Bahasa Inggeris, membangkitkan inferens bahawa responden-responden berada dalam kedudukan yang bermanfaat. Salah arah oleh hakim perbicaraan bahawa perayu bukannya seorang peniaga yang jujur dan tidak berpengalaman mewajarkan campurtangan pihak rayuan.

[4] Lagipun, alasan penghakiman hakim perbicaraan tidak tersedia sehingga Mac 2000, kelewatan yang mana mengurangkan penekanan sebarang pandangan hakim mengenai keboleh-percayaan saksi-saksi disebabkan peredaran masa dan peringatan yang kian berkurangan. Sebuah tribunal yang mengarahkan dengan sempurna mengenai undang-undang dan keterangan pasti akan memutuskan bahawa perjanjian tersebut adalah suatu tawar menawar tidak patut dan perayu berhak kepada penolakan guaman tersebut dengan kos.

[5] Akhirnya, kelewatan atau kelengahan responden-responden selama sekurang-kurangnya 19 bulan untuk memulakan tuntutan mereka adalah alasan yang mencukupi untuk menolaknya. Seksyen 32 Akta Had Masa 1953 memperuntukkan hak mahkamah menolak relief atas alasan kelewatan dan dengan itu seksyen ini membenarkan pembelaan equiti kelewatan untuk mengalahkan remedi common law gantirugi.

[Rayuan dibenarkan dengan kos.]

Case(s) referred to:

Black v. Wilcox [1976] 70 DLR (3d) 192 ***(refd)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675 ***(refd)***
Commercial Bank of Australia Ltd v. Amadio [1983] 152 CLR 447 ***(refd)***
Credit Lyonnais Bank Nederland NV v. Burch [1997] 1 All ER 144 ***(refd)***
Davis v. Maung Shwe Go [1911] LR 38 IA 155 ***(refd)***
Edwards v. Bairstow [1956] AC 14 ***(refd)***
Erlanger v. New Sombrero Phosphate Co [1878] 3 App Cas 1218 ***(foll)***
Foskett v. Mckeown [2000] 2 WLR 1299 ***(refd)***
Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors [1991] 1 CLJ 522 ***(refd)***
Gurcharan Singh v. Rochi Silk Store [1959] MLJ 229 ***(foll)***
Habib Bank Ltd v. Habib Bank AG Zurich [1981] 2 All ER 650 ***(foll)***
Hart v. O'Connor [1985] AC 1000 ***(refd)***
Haygarth v. Wearing [1871] LR 12 Eq 320 ***(refd)***
Lakshminarayana v. Singaravelu AIR [1963] Mad 24 ***(refd)***
Lee Kee Choong v. Empat Nombor Ekor (NS) Sdn & Ors [1976] 2 MLJ 93 ***(refd)***
Lever Bros Ltd v. Bell [1931] 1 KB 557 ***(refd)***
Lindsay Petroleum Co v. Hurd [1874] LR 5 PC 221 ***(foll)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 ***(refd)***
Manak Chand v. Puran AIR [1960] Madh Prad 235 ***(refd)***
Mohamed Salleh v. Ang Chan Siong [1949] MLJ 35 ***(refd)***
Ong Kim Khoon v. Gaya Filem Bhd [1979] 1 MLJ 79 ***(refd)***
Paris v. Machnick [1972] 32 DLR 723 ***(refd)***
Portman Building Society v. Dusangh [2000] 2 All ER 221 ***(refd)***
Ramalinga Pillai v. Jagadamba Ammal AIR [1951] Mad 612 ***(refd)***
Rangasami Gounder v. Periamuthu Gounder [1977] 1 Mad LJ 231 ***(refd)***
Shib Lal v. The Collector of Bareilly [1894] ILR 16 All 423 ***(refd)***
United States v. Bethlehem Steel Corp [1942] 315 US 289 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] 2 All ER 961 ***(refd)***
Westwill Pty Ltd v. Heath [1959] 52 SASR 461 ***(refd)***
Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)
Contracts Act 1950, s. 16
Evidence Act 1950, s. 111
Limitation Act 1953, s. 32
Specific Relief Act 1950, s. 21(1), (2)(a)

Specific Relief Act 1877 [India], s. 22

Other source(s) referred to:

The Law of Contracts, Prof Waddams, 2nd edn, p 382-384

For the appellant - M Thayalan; M/s Mohideen & Partners
For the respondents - Gan Teik Chee; M/s Gan Teik Chee & Ho

[Appeal from High Court, Pulau Pinang; Civil Suit No: 191/81]

Reported by Anne Khoo

JUDGMENT

Gopal Sri Ram JCA:

This is an important case. It has to do with whether our jurisprudence recognises a doctrine of inequality of bargaining power independent of the well-established doctrine of undue influence. This is the first time, at least as far as I am aware, that this issue has come up for decision at the appellate level. It is a matter upon which careful argument supported by the citation of authority would have been most helpful.

Let me narrate the facts in outline.

The appellant is a farmer. He earns part of his income by harvesting coconuts from land that he rents from the respondents. The appellant also owns two pieces of land. I will refer to them as "the subject property". The appellant's predecessor in title had acquired the subject property by prescriptive right under the land law in force in Penang at the material time. The appellant's root of title was therefore under a cloud and was defeasible.

On 11 November 1975, the appellant entered into an agreement to sell the subject property to the respondents for RM42,000. There is mention made in the agreement of the payment of a deposit of RM4,200. As an issue has been raised in respect of this, I will deal with it in some detail later. For the moment, let me complete the story.

The agreement made it plain that the appellant's title to the subject property was under a cloud and was defeasible. An indorsement on the title said as much. A clause in the agreement required the appellant to make good title within 12 months of the agreement. This included the obtaining of an order of court establishing his right of ownership of the subject property. The result was to be a cancellation of the indorsement on the title by the appropriate authority in order to produce indefeasiblity of title. Another clause in the agreement (cl. 6) provided that in the event of the appellant failing to make good his title, that is to say, failing to convert it into an indefeasible title, within the aforesaid period of one year, the respondents would be entitled to a refund of the deposit paid to the appellant under the agreement. As it happened the appellant did not obtain the necessary cancellation of the indorsement until 22 January 1981. But he never obtained the order of court at all. Meanwhile, on 24 October 1979, while his application for cancellation of the indorsement was pending, the appellant, by a letter of that date, purported to terminate the agreement with the respondents. The respondents refused to accept the termination. But they did not bring proceedings until 25 May 1981.

The appellant defended the claim on two broad grounds. First, he claimed that the agreement had been vitiated by undue influence. His second line of defence was that the respondents were barred by laches from seeking relief.

The learned judge who heard the action rejected the defence of undue influence. But he declined specific performance apparently on the ground that – and I quote his words – "both parties were equally to blame for the predicament in which they found themselves." The judge then awarded the respondents damages of RM1.2 million representing half the current market value of the subject property. The appellant's appeal is directed against this order of the learned judge. The respondents cross-appealed against the judge's refusal to decree specific performance. However, at the conclusion of his argument, counsel for the respondents informed us that he was abandoning the cross-appeal.

The appellant's case on the appeal was directed along two lines. First, it was argued that while the learned judge was entitled to reject the defence of undue influence, he ought to have gone on to hold that the appellant had established a case of unfair advantage. The second submission made in support of the appeal is that in any event the claim ought to have been dismissed on grounds of laches. I will address each of these heads of argument in turn.

The appellant's case under the first head of argument is based on s. 21(2)(a) of the Specific Relief Act 1950 ("the SRA"). In order to appreciate its proper context, I will reproduce s. 21(1) and (2)(a) of the SRA. They read as follows:

> 21 (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
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> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
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> (a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part;

The principle upon which the appellant relies is drawn upon the phrase "unfair advantage" appearing in s. 21(2)(a) of the SRA. The question that has been directly put to us in this appeal is whether a party to a contract may altogether avoid its consequences on the grounds appearing in that sub-section. This brings into focus the doctrine of inequality of bargaining power falling short of the proof of undue influence under s. 16 of the Contracts Act 1950 read

with s. 111 of the Evidence Act 1950. Two questions arise. The first is whether our law recognises a general doctrine of inequality of bargaining power. Second, if it does, what is the nature and scope of that doctrine? Before an answer is attempted to these questions, I think it will be useful to see how some of the other Commonwealth jurisdictions have developed their equity jurisprudence in this area.

I begin with England. It is clear from the state of the authorities to which I will refer momentarily that English equity jurisprudence does in fact recognise a wider doctrine of unconscionable bargains as a species of equitable fraud. There are numerous decisions which bear this out. I will not go through them all in this judgment. Suffice that I refer to what I think is the leading case upon the subject. It is *Credit Lyonnais Bank Nederland NV v. Burch* [1997] 1 All ER 144. In that case, Nourse LJ said (at p. 151):

> On that state of facts it must, I think, have been very well arguable that Miss Burch could, directly against the bank, have had the legal charge set aside as an unconscionable bargain. Equity's jurisdiction to relieve against such transactions, although more rarely exercised in modern times, is at least as venerable as its jurisdiction to relieve against those procured by undue influence. In *Fry v. Lane, re Fry, Whittet v. Bush* [1889] 40 Ch D 312 at 322, [1886–90] All ER Rep 1084 at 1089, where sales of reversionary interests at considerable undervalues by poor and ignorant persons were set aside, Kay J, having reviewed the earlier authorities, said:
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> > The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and a *fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was "fair, just, and reasonable".
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> Lord Selborne LC's words will be found in *Earl of Aylesford v. Morris* [1873] LR 8 Ch App 484 at 491, [1861–73] All ER Rep 300 at 303. The decision of Megarry J in *Cresswell v. Potter* [1978] 1 WLR 255 at 257 where he suggested that the modern equivalent of 'poor and ignorant' might be 'a member of the lower income group … less highly educated', demonstrates that the jurisdiction is in good heart and capable of adaptation to different transactions entered into in changing circumstances. See also the interesting judgment of Balcombe J in *Backhouse v. Backhouse* [1978] 1 All ER 1158 at 1165–6, [1978] 1 WLR 243 at 250–252, where he suggested that these cases may come under the general heading which Lord Denning MR referred to in *Lloyds Bank Ltd v. Bundy* [1974] 3 All ER 757 at 765, [1975] QB 326 at 339 as 'inequality of bargaining power'.

> A case based on an unconscionable bargain not having been made below, a decision of this court cannot be rested on that ground. But the unconscionability of the transaction remains of direct materiality to the case based on undue influence. Since it was so manifestly disadvantageous to Miss Burch, the bank could not be said to have taken reasonable steps to avoid being fixed with constructive notice of Mr Pelosi's undue influence over her when neither the potential extent of her liability had been explained to her nor had she received independent advice.

The other judgment I would quote from is that of Millett LJ at p. 152-3:

> Miss Burch did not seek to have the transaction set aside as a harsh and unconscionable bargain. To do so she would have had to show not only that the terms of the transaction were harsh or oppressive, but that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience' (see *Multiservice Bookbinding Ltd v. Marden* [1978] 2 All ER 489 at 502, [1979] Ch 84 at 110 per Browne-Wilkinson J and *Alec Lobb (Garages) Ltd v. Total Oil GB Ltd* [1983] 1 All ER 944 at 961, [1983] 1 WLR 87 at 95, where I pointed out that there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself, but added that 'the former may often be inferred from the latter in the absence of an innocent explanation').
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> In the present case, the bank did not obtain the guarantee directly from Miss Burch. It was provided to the bank by Mr Pelosi, who obtained it from Miss Burch by the exercise of undue influence. In such a context, the two equitable jurisdictions to set aside harsh and unconscionable bargains and to set aside transactions obtained by undue influence have many similarities. In either case it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the court may in a proper case infer the presence of the impropriety from the terms of the transaction itself.

A careful examination of the judgments of the Court of Appeal in *Burch (ibid)* make clear the existence of the two similar yet separate equitable jurisdictions to relieve a party to a contract from its consequences. The first of these is the traditional category of undue influence. The other is the lesser known but equally efficacious doctrine of unconscionable bargains. Further, the authorities referred to in the judgments of the learned Lord Justices of Appeal show that the latter doctrine operates in circumstances less stringent than those demanded by the former. A very recent illustration of a case where the facts fell short of establishing an unconscionable bargain is *Portman Building Society v. Dusangh* [2000] 2 All ER 221.

The position in Australia is the same as that in England. It is exemplified by the decision of the High Court in *Commercial Bank of Australia Ltd. v. Amadio* [1983] 152 CLR 447. It is sufficient that I quote from two passages in the report. The first is in the judgment of Gibbs CJ at p. 459:

> In my opinion it should not be held that this was the case of an unconscientious bargain of the kind which equity would set aside, *even in the absence of fraud, misrepresentation or undue influence*. Of course, the bank and the respondents did not meet on equal terms, but that circumstance alone does not call for the intervention of equity, as Lord Denning M.R. clearly illustrated in *Lloyds Bank v. Bundy* [1975] QB 326, 336. *A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed.* The principle of equity applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands": *Blomley v. Ryan* [1956] 99 CLR 362 per Kitto J, and see at pp. 405-406, per Fullagar J (emphasis added.)

The second passage is in the judgment of Mason J at p. 461:

> Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of "unconscionable conduct" is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, eg, a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink. *Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.* (emphasis added.)

I also find the South Australian case of *Westwill Pty Ltd. v. Heath* [1959] 52 SASR 461 to be of some assistance. In that case, Duggan J, adverted to some of the essential features of the doctrine of unconscionable bargains. In considering whether equitable relief is available if unconscientious advantage is taken of a party who is at a special disadvantage in a contractual dealing; the first requirement to be satisfied is the existence of circumstances which amount to a special disadvantage. The second essential requirement is that the court concerns itself with the conduct of the stronger party rather than with

the reality of the weaker party's consent. The test is not whether the stronger party has driven a hard bargain. The court will not rewrite an improvident contract where there is no disability on either side. But the conduct of the stronger party will be regarded as unconscionable if he knew or ought to have known of the special disadvantage and took advantage of it so as to further his own interests in the transaction. Third, mere evidence of undervalue, except where the undervalue is very gross, will not lead a Court of Equity to interfere against a completed purchase. However, a sale at undervalue may be relevant in proving that a special disadvantage existed as well as the fact that advantage was taken of it. Fourth, the absence of independent advice to a party plainly in need of it may lead to the conclusion that the party was at a disadvantage. Fifth and last, generally speaking, if the weaker party proves that he was at a special disadvantage and that his condition was sufficiently evident to the stronger party at the time of the contract so as to make it *prima facie* unfair to accept the benefit of the contract, the burden of proving that the transaction was nevertheless fair lies upon the stronger party.

The law of New Zealand is also similar to that of England. Although there are several cases of the New Zealand courts on the topic, I find citation of one of these to be sufficient. It is *Hart v. O'Connor* [1985] AC 1000. Being a judgment of the Privy Council, it is entitled to much respect. The relevant passage is at p. 1017 of the report, in the advice of the Board delivered by Lord Brightman:

> If a contract is stigmatised as 'unfair', it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this 'procedural unfairness'. It may also, in some contexts, be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this 'unfairness' from procedural unfairness, it will be convenient to call it 'contractual imbalance'. The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.

I now turn to Canada. Courts of that jurisdiction appear to favour a more general doctrine of unconscionability in terms wider than that entertained in England. The Canadian position is exemplified by the decision in such cases as *Paris v. Machnick* [1972] 32 DLR 723 and *Black v. Wilcox* [1976] 70 DLR (3d) 192.

In *Paris v. Machnick (ibid)*, an illiterate farmer sold her farm worth $9000 for $2500. She later sued for rescission or alternatively for additional compensation. Hart J upheld the plaintiff's claim of unconscionability on the ground of illiteracy. However, he ordered the payment of additional compensation in *lieu* of rescission, thereby demonstrating the flexibility of equity in the remedial field. What is of interest is that in coming to his conclusion, Hart J was influenced by English jurisprudence, in particular the decision in *Haygarth v. Wearing* [1871] LR 12 Eq. 320.

In *Black v. Wilcox (ibid)* the Ontario Court of Appeal set aside an agreement to sell land at undervalue on the ground of unconscionability. At the time the agreement had been entered into the vendor, to the purchaser's knowledge, had been suffering from the effects of alcohol and had no independent advice. Evans JA said (at p. 196):

> Counsel have referred us to many Canadian, English and Australian authorities and while it is difficult to draw a clear pattern from the varied factual situations presented in the several cases, one central theme arises and that is the pronounced inequality of bargaining power between the parties and the gross improvidence of the contract. When these common features appear, inequality of position, an overreaching by the stronger and a highly beneficial bargain to him, a presumption arises that the stronger party has, in the words of Lord Selborne, LC, in *Earl of Aylesford v. Morris* [1873] LR 8 Ch. App. 484 at p. 491, made:
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> > ... an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.
>
> On the evidence, the impugned transaction is unconscionable and improvident on its face. Those factors cast upon the defendant the obligation of showing that the presumption of unfair advantage has been displaced. This he has failed to do. A long line of judicial authority in this province has followed the principle stated in *Vanzant v. Coates* [1917] 40 OLR 556, 39 DLR 485, and restated in *Mundinger v. Mundinger* [1969] 1 OR 606, 3 DLR (3d) 338 (affirmed [1970] SCR vi, 14 DLR (3d) 256n) that in a situation of this nature, the Court will invoke the equitable rule that a person who is not equal to protecting himself will be protected, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so by reason of their commanding and superior bargaining position. The combination of inequality of position and improvidence is the foundation upon which the doctrine is based. The plaintiff's bargaining power was grievously impaired by reason of his excessive indulgence in alcohol. This condition was readily apparent to the defendant who exploited it to his advantage as evidenced by the enormous discrepancy between the purchase price of the property and its market value.

> It would not be consistent with equity and good conscience to permit his bargain to remain unimpeached. The plaintiff was hopelessly over-matched and the defendant, who had to be aware of the great disparity in their positions, overreached and to obtain a benefit immoderately advantageous to him. In such circumstances, in my opinion, a Court must exercise its equitable jurisdiction and set aside the unconscionable transaction.

The position in Canada is summed up by Professor Waddams in his work *"The Law of Contracts"*, 2nd edn, p. 382-4:

> In *Slator v. Nolan* [1876] 11 IR Eq. 367 Sullivan, MR, said:
>
> > ... if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other .... [and] one party has taken undue advantage of the other ... a transaction resting upon such unconscionable dealing will not be allowed to stand.
>
> This line of cases has been taken up and extended in a series of modern Canadian cases. The clearest cases of relief on this ground have been in favour of vendors of land, but analogous cases have granted relief to borrowers of money, to sellers of goods guarantors of loans, to buyers of goods' and services and to injured persons who disadvantageously agree to release their actions for damages. These cases, adopting a comment by a Canadian writer [the reference here is to Crawford 'Comment' [1966] 44 Can. Bar Rev. 142] lay down as the criterion of relief an immoderate gain or undue advantage taken of inequality of bargaining power. The factors held to indicate the necessary inequality include old age, emotional distress, alcoholism and lack of business experience. It appears that any situation that results in the weaker party's being 'overmatched and overreached' will qualify for relief if the stronger party secures an immoderate gain.

I turn now to examine cases from India. These are of particular significance because s. 21 of the SRA is drawn from the Indian Specific Relief Act 1877. The Indian authorities appear to interpret their provision as housing a doctrine of inequality of bargaining power. For example, in *Shib Lal v. The Collector of Bareilly* [1894] ILR 16 All. 423, I find Tyrell & Burkitt JJ (at p. 432-3) saying that: "There was no inequality whatever between the contracting parties." A further example is *Lakshminarayana v. Singaravelu* AIR [1963] Mad 24, where, at p. 29, Ganapatia Pillai J said:

> It is well established that mere inadequacy of price for which a property is agreed to be sold would by itself be of no hardship which could be taken note of by a court refusing specific performance. It is also well established that specific performance is a discretionary remedy and the court is not bound to grant such relief merely because it is lawful to do so. Section 22 of the Specific Relief Act lays down instance of cases in which the court may properly exercise

a discretion not to decree specific performance. Obviously the list of illustrations is not exhaustive. The modern rule of refusal to decree specific performance of a contract for sale of *immovable property has been stated in* Pollock and Mullah's Indian Contract and Specific Relief Acts, 8th Edn. at page 798 thus:

> It is clear that the court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered.

Oxford v. Provand [1868] 2 PC 135 at p. 151, *Jethalal Modi v. Bachu*, 47 Born LR 460: (AIR 1945 Bom 481), are relied on in the foot-note as authorities for this rule. Any contract which gives one party an unfair advantage must fall under the category of contracts which could not be specifically enforced. This implies that the contracting parties were not at the time of the contract on equal bargaining terms.

Lakshminarayana v. Singaravelu (ibid) was applied in *Rangasami Gounder v. Periamuthu Gounder* [1977] 1 Mad. LJ 231. Ramprasada Rao J, explained the phrase "unfair advantage" appearing in the parallel Indian statute:

> The expression 'unfair advantage' is not one of art but is one which is pregnant with meaning. The unfair advantage should be such that on an overall appreciation of the situation the Courts which are to adjudicate upon the subject-matter should come to the conclusion that the party which is complaining of such unfair advantage should have been tricked and that there was a designed approach on the part of the plaintiff to victimise the alleged effected party. It is stated by Fry in his work on 'Specific Performance' as follows.
>
> > To make a contract for an insufficient consideration incapable of enforcement by the purchaser would be practically to prevent a man from selling his property at less than its value ... however desirous he might be to sell it for the price actually obtained and however unwilling or unable the purchaser might be to purchase at its full value.
>
> It is in this light and context that the expression 'unfair advantage' appearing in section 20 (2) of the Specific Relief Act is to be interpreted and applied. In the light of Explanation I to the section, it has been very well understood by Courts of law that mere inadequacy of consideration is no ground at all to refuse the discretionary relief of specific performance.
>
> ...
>
> It has never been brought out and much less proved in a manner known to law that the price paid was grossly inadequate. There is a mountain of difference between inadequacy of price and gross inadequacy of price. Even

> in cases where the price is grossly inadequate, Courts require an additional dose of proof that by reason of such a design on the part of an avaricious purchaser, the vendor has been victimised. It is this sort of proof that is required to establish or rather prompt the Court to negative a decree for specific performance on the footing that the consideration is grossly inadequate.

Thus, although mere inadequacy of price is insufficient in itself, it may, coupled with other circumstances support an inference of unfairness in the transaction.

In *Manak Chand v. Puran* AIR [1960] Madh. Prad. 235, 236, Shiv Dayal J, summed up the law on the Indian provision. He said:

> A contract may be perfectly valid in law yet there may be want of fairness about it. In order to apply equitable principles laid down in the first clause of s. 22 it is not necessary that fraud or misrepresentation by the plaintiff must be made out. It is enough if there is inequality and unfairness due to any cause whatsoever. If there are surrounding extrinsic circumstances such as duress, intimidation, or 'when the plaintiff obtained the agreement by short unscrupulous practices, by overreaching, by non-disclosure of important facts, by trickery, by taking undue advantage of his position by any means which are unconscientious,' the court has to be very cautious.
>
> It is not necessary to show that the plaintiff was guilty of intentional unfairness. But the mere fact that a bargain is onerous cannot avail of as a defence to a suit for specific performance unless it is also established that the plaintiff took an undue advantage of his position or of the adversity of the defendant.

One last case that I ought to mention is the Privy Council's decision in *Davis v. Maung Shwe Go* [1911] LR 38 IA 155 (at p. 168) where it refused to set aside an admittedly onerous bargain on the ground that it was not unconscionable. But the report does not appear to contain any reference to s. 22 of the Indian statute. What comes across fairly clearly from the Indian cases is that in order for the section to bite, there must be some objective unfairness in the bargain struck between the parties; some oppression or victimisation to be garnered from the circumstances existing at the time the agreement is made. Thus, in *Ramalinga Pillai v. Jagadamba Ammal* AIR [1951] Mad. 612, 616, Viswanatha Sastri J, observed as follows:

> The question of the hardship of a contract or its reasonableness has generally to be judged of at the time it was entered into. If it was then fair and proper and not oppressive, it is immaterial that by force of subsequent circumstances or events, as for instance, the rise in the price of landed property due to war conditions, the contract has become more beneficial to the purchaser. Here the parties had equal means of knowledge and equal means of ascertaining the value of the property.

Closer to home, in *Fui Lian Credit & Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1991] 1 CLJ 522, Chong Siew Fai J (as he then was) applied principles of English equity jurisprudence to determine whether a lease of goods was bad for unconscionability. He said (at p. 526):

> In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the Court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means. *Multiservice Bookbinding Ltd. & Ors. v. Marden* [1978] 2 All ER 489.

His Lordship after referring to Lord Brightman's judgment in *Hart v. O'Connor (supra)*, went on to negative any unconscionability in the following terms:

> In *Alec Lobb Ltd. v. Total Oil G.B. Ltd.* [1985] 1 All ER 303 CA Dillon LJ rejected the contention that where there was unequal bargaining power, the test was whether its terms were fair, just and reasonable and that it was unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. He went on (p. 313):
>
> > Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. Any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning MR did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the Courts by the objective criterion of what was reasonable: see *Lloyds Bank Ltd. v. Bundy* [1974] 3 All ER 757 at 763, [1975] QB 326 at 336 . The Courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and of the exercise by the stronger of coercive power are thus brought in.
>
> In our instant case no evidence at all was adduced to show not only how the lease agreement or any of its terms is, objectively, unreasonable (which, in any event, is not sufficient, see *Multiservice Bookbinding v. Marden supra*, but also the inequality of bargaining power of the parties and how the conduct of the plaintiff could be regarded as oppressive, harsh or unconscionable. There is no evidence of any victimisation or taking advantage of another's weakness or of constructive fraud as explained in the judgment of Lord Brightman) in *Hart v. O' Connor* quoted above.

It may, I think, also be mentioned that the equity jurisprudence of the United States is derived in its entirety from English principles, although intervention is on a much broader basis. The point may be illustrated by a passage from the dissent of Frankfurter J, in *United States v. Bethlehem Steel Corp.* [1942] 315 US 289:

> In England prior to 1285 (Statute of Westminster 11, 13 Edw. 1, c. 50) suitors were frequently 'obliged to depart from the Chancery without getting writs, because there are none which will exactly fit their cases, although these cases fall within admitted principles.' Maitland Forms Of Action at Common Law, Lect. IV (1936 ed.) p. 51. Today it is held that because the circumstances of this case cannot be fitted into a neatly carved pigeonhole in the law of contracts, 'daylight robbery,' exploitation of the 'necessities' of the country at war, must be consummated by this Court. It is said that familiar principles would be outraged if *Bethlehem* were denied recovery on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?
>
> These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other. 'And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.' *Vernon v. Bethell*, 2 Eden 110, 113. So wrote Lord Chancellor Northington in 1761.
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> The fact that the representatives of the Government entered into the contracts 'with their eyes wide open' does not mean that they were not acting under compulsion. 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' Holmes, J in *Union Pacific R. Co. v. Public Service Commission* 248 US 67, 70.

Emerging from the thicket of cases, I now turn to the two questions that I posed earlier in this judgment. The first of these does not, I apprehend, cause any difficulty. In my judgment, the time has arrived when we should recognise the wider doctrine of inequality of bargaining power. And we have a fairly wide choice on the route that we may take in our attempt to crystallise the law upon the subject. The position is that after 1956, we are at liberty to

fashion rules of common law and equity to suit our own needs and are not to treat ourselves as being bound hand and foot by English cases. See, *Lee Kee Choong v. Empat Nombor Ekor (NS) Sdn & Ors* [1976] 2 MLJ 93; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*. [1990] 1 CLJ 675.

We may adopt the English doctrine of unconscionability in toto. That is a choice that is available to us because of s. 3(1)(a) of the Civil Law Act 1956 which (in so far as relevant to the present appeal) reads:

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –
>
> (a) in West Malaysia or any part thereof, apply the common law of England and rules of equity as administered in England on the 7th day of April 1956.

This section applies because no other provision of written law has been enacted upon the subject of inequality of bargaining power in contracts. Section 16 of the Contracts Act to which I have already referred deals with quite a different and much narrower doctrine. I do not therefore see any difficulty in receiving the well-established English doctrine of unconscionable bargains into our jurisprudence through the statutory doors of s. 3(1)(a).

The other choice we have is to act by analogy with statute. This would be to read into our general equity jurisprudence the principles governing SRA s. 21. The advantage here is that we have enough guidance from the wealth of Indian cases on the equipollent section.

But I hesitate in taking either of these courses for three reasons. In the first place, both the English doctrine and s. 21(2)(a) are quite narrow. The former is fashioned according to the needs of a society very different from our own. The special local circumstances prevalent in Malaysia point away from the English position. We are still a comparatively small country with a large rural population. There are many of our people who are still vulnerable in matters of commerce. Despite the several pieces of legislation, there continues to be insufficient statutory protection afforded to our consumers. We do not, for example have any legislation similar to the UK Unfair Contract Terms or Misrepresentation Acts. Adopting a stricter approach either under the English doctrine or under the statute may therefore result in leaving the vast majority of the population vulnerable to sharp practice in the hands of unscrupulous businessmen.

What is therefore called for is a fairly flexible approach aimed at doing justice according to the particular facts of a case. Historically, that is what equity is all about. That brings me to the third alternative. This is to adopt the English doctrine but apply it in a broad and liberal way as in Canada. I find this the

most just solution. It is a method by which practical justice may be achieved within a framework of principle. I do not consider this to be an innovation. Even English courts are recently portraying a greater willingness to apply the equity jurisprudence developed in Canada and the United States. See, for example the speech of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] 2 All ER 961, at 999 suggesting the introduction of the remedial constructive trust imposed by the courts of the United States of America. Also see, the speech of Lord Millett in *Foskett v. Mckeown* [2000] 2 WLR 1299 where, in the context of tracing a proprietary right in equity, there is copious citation of cases from the United States and Canada.

That brings me to the submissions of the respondent in the present appeal. Counsel for the respondent submitted that even if the appellant is right in his argument, nothing really turns upon it. Counsel argues that upon the appellant's pleaded case, the impact of any unfair advantage would be to deny the respondent the remedy of specific performance. This, the judge already has done. So there is really no point in going into this question again. I must confess that I was much attracted to this argument when I first heard it. But having considered the response by counsel for the appellant, I do not think that it is quite proper for us to simply shut the door on the appellant's face on this part of the case. Of importance is the fact that the judge did not act upon the pleaded case of unconscionability to deny the respondent specific relief. He did it for some other reason. So the question is still fairly open to the appellant to raise and expect a resolution of at this level. This is a case where all material averments on point have been pleaded. And that is sufficient to raise the plea. See, *Lever Bros Ltd. v. Bell* [1931] 1 KB 557, Scrutton LJ at p. 582. What remains is to discover the applicable principles and to apply them to the facts of the present appeal. If it is found that there was unconscionability then it would defeat the whole of the claim and not merely bar the remedy of specific performance.

With that I now turn to consider the facts relied on in the present appeal in support of the appellant's case for inequality of bargaining power. Apart from the facts to which I have adverted when outlining the case, there are the following matters relied on by the appellant in support of its case. First, the deposit mentioned in the agreement. It is not in dispute that the deposit mentioned in the agreement was not paid by the respondents to the appellant. What happened was that the deposit payable was set off against the rentals that the appellant had to pay the respondent in respect of the other piece of land from which he harvested coconuts. Counsel for the respondent argues that there is nothing in the point. He says that if the appellant was unhappy about the set off, he should have said so at the outset. With respect, I am unable to

agree. It must be remembered that the appellant was at the respondent's mercy for his livelihood. He was in no position to dictate any terms of payment. He was dependent upon the respondents' permission to continue the harvesting of coconuts from their land. More importantly, the agreement, to the knowledge of the respondents told a lie about itself. It said that a deposit had been paid. That was not true. The truth is that there had been a set off. But that was not disclosed. The fair inference is that the respondents were in a position of advantage. Secondly, it is not in dispute that at the material time, that is to say, when the agreement was executed, the appellant had no separate legal advice. The solicitors who drew up the agreement were appointed by the respondents. Thirdly, the unwillingness of the appellant to part with his land is amply demonstrated by his lethargy in making good title. If he was really keen on a sale to the respondents, he would have certainly moved with speed to clear the blot on his prescriptive title. Lastly, it is clear that the appellant spoke no English. He was conversant only in Bahasa Malaysia. The agreement is however in the English language. There is no statement or certification of any sort in the agreement that it had been explained to the appellant in his mother tongue.

Despite all these facts, the learned judge described the appellant as a businessman who is "no babe in the woods". With respect, that description is an error. It is occasioned by the learned judge turning an indulgent eye upon evidence that called for the strictest scrutiny. It is, in my view a serious misdirection on his part warranting appellate interference.

This is not a case that involves pure questions of fact founded upon the credibility of witnesses. Rather, it is a case where the facts are not in dispute at all and all that is called for is the drawing of the inferences that are fairly admitted by the evidence. That, according to well-established authority of high repute, is a question of law. Thus, in *Gurcharan Singh v. Rochi Silk Store* [1959] MLJ 229, Thomson CJ applied the statement of the law by Lord Radcliffe in *Edwards v. Bairstow* [1956] AC 14. Lord Radcliffe there said (at p. 36):

> If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.

There is an added feature in this case. Although the decision on the matter was given on 4 January 1996, the learned judge's grounds of judgment were not made available until March 2000. In these circumstances, any views expressed by the learned judge on the credibility of the witnesses who gave their evidence before him does not attract as much weight. It is difficult, if not impossible, to say with any certainty that he could recall after four years the impact made by each witness upon his mind. The psychological advantage enjoyed by the trial judge was therefore lost to him by the passage of time between the trial and the delivery of his reasons. Who can tell for certain that his mind was not confused between the evidence in this case and that of one or other of the many cases he would have tried in the interim? This, I think, is an added consideration that negates to a large extent the audio-visual advantage rule that governs appeals on questions of fact.

In my judgment, a judicial tribunal properly directing itself on the law and the evidence would have concluded that the agreement between the appellant and the respondents was an unconscionable bargain. Such a conclusion would result in the agreement not being enforceable either at common law by an award of damages or by a decree of specific relief in equity. The appellant was entitled to have the suit dismissed with costs.

That brings me to the question of laches which is the second ground advanced in this appeal. Counsel for the appellant submitted that even if he was wrong upon the first issue, *viz.*, that of unconscionability, his client was nevertheless entitled to succeed upon the second ground. Before turning to the factual matrix relevant to this part of the case, it is necessary to identify the principles which govern the operation of the plea of laches. They are not in doubt. They were summed up by the learned Chief Justice of the Calcutta High Court, sitting in the Privy Council in *Lindsay Petroleum Co v. Hurd* [1874] LR 5 PC 221, 239:

> Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

This pronouncement of Sir Barnes Peacock was affirmed by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co* [1878] 3 App Cas 1218:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

Our courts have applied these observations on more than one occasion. See, *Yong Nyee Fan & Sons Sdn. Bhd. v. Kim Guan & Co. Sdn. Bhd.* [1979] 1 MLJ 182; *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371.

Now, it is true that in some, if not all, of the cases, the court has dealt with laches as a defence to specific relief. Thus, for example, in *M Ratnavale v. S Lourdenadin (supra)*, at p. 378, Hashim Yeop A. Sani SCJ, when delivering the judgment of the Supreme Court referred to denying the remedy of specific performance on the ground of laches. It is not difficult to appreciate the concept of an equitable defence being relied upon to meet an equitable remedy. But that is not the position here. The question that has been posed in the present appeal is whether the equitable defence of laches may be used to defeat the common law remedy of damages. I think that that question must receive an affirmative answer.

In the first place, there is s. 32 of the Limitation Act 1953. It provides as follows:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

It is important to notice that the section speaks of "any equitable jurisdiction to refuse relief" without specifying the kind of relief that may be refused. It must therefore follow that the section permits laches to be used as a defence to the common law relief of damages.

Secondly, in *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 2 All ER 650, 666, Oliver LJ (as he then was) dealt with a contrary argument in a passage that merits recall:

> To this counsel for the plaintiffs retorts that that applies only where you are considering the doctrine of laches or acquiescence in relation to the assertion of equitable rights and not where you are considering the enforcement by equitable means of legal rights; and we were regaled with authorities on both sides for the purpose of establishing whether a plaintiff in a passing-off action is protecting a legal right or an equitable right.

> I have to confess that I detect in myself, despite the erudition displayed by both counsel, a strong predilection for the view that such distinctions are both archaic and arcane and that in the year 1980 they have but little significance for anyone but a legal historian. For myself, I believe that the law as it has developed over the past twenty years has now evolved a far broader approach to the problem than that suggested by counsel for the plaintiff and one which is in no way dependent on the historical accident of whether any particular right was first recognised by the common law or was invented by the Court of Chancery.

Counsel for the respondents submits that laches is not, as a matter of pleading, available as a general defence to the appellant. According to him, the appellant's pleaded case has restricted the defence to the remedy of specific performance. Accordingly, it is not now open to the appellant to use it to defeat the award of damages made by the trial judge. With respect, I am unable to agree with this argument. When the defence is read as a whole, and when it is read in the light of the appellant's written submissions in the court below, it is plain that what the appellant was really saying was that the respondents' claim should be dismissed because of laches. With that, I now turn to examine the circumstances relied upon in support of the laches plea.

The relevant chronology is as follows. The agreement was dated 11 November 1975. The one-year period within which the appellant was to make good title expired latest on 11 November 1976. The very first letter from the respondents' solicitor upon the subject at hand came on 16 June 1978. But the appellant did not respond to this. On 23 October 1979, the appellant's solicitor wrote to the respondents returning the deposit. It was proved through the evidence of the solicitor (DW2) that this was done on his advice despite there having been no actual payment of a deposit. The appellant then obtained a clear title to the subject property on 22 November 1980.

On 31 March 1981, the respondents sent a cheque dated 2 April 1981 representing the full balance of the purchase price. The appellant has taken issue with this mode of payment. According to him, a cheque is not good tender. He relies on *Mohamed Salleh v. Ang Chan Siong* [1949] MLJ 35 and *Ong Kim Khoon v. Gaya Filem Berhad* [1979] 1 MLJ 79. Neither case calls for any discussion. Both support the proposition that payment by cheque is not good tender in the absence of a contract to the contrary. But I do not find the need to decide this appeal upon such a narrow ground as this.

Returning to the factual narrative, there is only one last event that calls for mention. It is that the writ in these proceedings was issued out on 22 May 1981. Now, if one takes the one-year period prescribed by the agreement as the commencement point, it means that the respondents did nothing to enforce

their rights, if any, against the appellant for more than four years after the accrual of a cause of action. If one takes the later date of 23 October 1979, when the appellant returned the deposit, then nothing was done about 19 months.

If in *M Ratnavale v. S Lourdenadin (supra)* delay of fourteen months was fatal, it must come as no surprise to the respondents that I find their conduct most dilatory. The appellant's conduct of returning the deposit was the clearest evidence of an intention to repudiate his obligations, if any, under the agreement. The respondents' continued inaction thereafter necessarily attracts the inference of disinterestedness. In my judgment, it would be positively unjust to permit the respondents to succeed in their action against the appellant. The appellant was accordingly entitled to have the claim dismissed on the ground of the respondents' laches.

For the reasons already given, I would allow this appeal. The orders made by the judge are set aside. The respondents' action is dismissed. The appellant will have the costs of this appeal and those incurred in the High Court. The deposit paid into court is to be refunded to the appellant.

My learned brothers Mokhtar Haji Sidin and Abdul Kadir Sulaiman, JJCA have seen this judgment in draft and have expressed their concurrence with the reasons herein.